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BETWEEN WAR AND PEACE: INTERMITTENT ARMED CONFLICT AND INVESTMENT ARBITRATION

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1 July 2018

1.	Introduction.....	1
2.	The Libyan Civil Wars	3
2.1	The Political and Military Situation	3
2.2	Effects on Foreign Investors.....	5
3.	Defining Armed Conflicts in Relation	7
3.1	International Armed Conflicts.....	7
3.2	Non-International Armed Conflicts.....	8
4.	Suspension or Termination of IIAs during Armed Conflicts	9
4.1	2011 ILC Draft Articles	9
4.2	UNSC Resolutions.....	12
5.	Operability versus Applicability of IIAs during Armed Conflicts.....	13
5.1	Full Protection and Security	14
5.2	War Clauses.....	15
6.	Defences Precluding Wrongfulness during Armed Conflicts.....	16
6.1	Necessity	16
6.2	Force Majeure.....	18
7.	Conclusions.....	20

Abstract

During periods of armed conflict, a State's treaty commitments may be suspended or replaced by other international legal obligations, often relating to international humanitarian law, the laws of war or international human rights law. However, international investment agreements (IIAs) may be distinct in this respect. A State's ability to derogate from its IIA obligations during periods of armed conflict is likely to be extremely limited or impossible; many IIAs explicitly provide protections to foreign investors in times of armed conflict or war. What is less clear is how the incidence of armed conflict within the territory of a State subject to an investment treaty dispute is to be resolved by an arbitral tribunal when the armed conflict is not – and possibly cannot be – clearly defined; or where there are cycles of war and peace within short periods of time and relating to the same general situation. We address this question in the context of the Libyan Civil War, considering the most relevant standards of protection included in IIAs concluded by Libya, as well as the most likely defences which Libya may invoke to preclude wrongfulness for possible breaches of its IIA obligations.

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1. Introduction

The question as to the scope of application of international treaties and their obligations during periods of armed conflict is a much-discussed issue. For some obligations, a State's treaty commitments may be suspended in times of war or replaced by other international legal obligations relating to international humanitarian law or the international law of armed conflict. In other instances, such as in the case of International Investment Agreements (IIAs), a State's ability to derogate from its IIA obligations in periods of armed conflict is likely to be extremely limited or impossible – many of the obligations in IIAs explicitly provide protections to foreign investors in times of armed conflict and war.

Even if a State is able to derogate from its treaty obligations or to invoke legitimate grounds to preclude wrongfulness under the customary international law doctrines of necessity or *force majeure*, these defences are narrow: with very high thresholds, limited temporal scope, and are likely to still require compensatory reparation for damages in most instances. However, the base assumption is that IIA obligations, especially in the context of an investment treaty arbitration (ITA), shall continue to apply during periods of armed conflict. Article 3 of the 2011 ILC Draft Articles on the Effects of Armed Conflicts on Treaties (2011 ILC Draft Articles) clearly states that “the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of the treaty”¹ either between the State parties to the armed conflict or in relation to third States not involved in the armed conflict.

However, what is not clear, is how the incidence of armed conflict in the territory of a State responding to an ITA claim is to be resolved by an arbitral tribunal when the armed conflict is not – and possibly cannot be – clearly defined; or where there are cycles of war and peace within short periods of time and relating to the same general situation. There are innumerable temporal and definitional problems regarding both the operability and application of IIA obligations and State defences in ITA in periods of armed conflict: how does a tribunal assess derogation or limitations from IIA obligations when it is clearly not a traditionally defined war or armed conflict or is only intermittently so? What is the relationship between so-called ‘War Clauses’ and other IIA obligations – especially the full protection and security (FPS) standard – during periods of armed conflict? How should an arbitral tribunal assess customary international law defences by a respondent State when the ‘fog of war’ presents clear hurdles in determining the exact periods when such a defence might apply? How should arbitral tribunals assess the fact that in some cases it could be argued that the government itself might have contributed to its own imminent peril, through the use of excessive force or repression against its citizens and investors or when that government failed to observe rules of international humanitarian law?

The question that this article addresses is simple: to what extent, under what conditions, and for how long might a State derogate, limit or suspend the application of its IIA obligations

¹ Draft Articles on the Effects of Armed Conflicts on Treaties (2011 Draft Articles), UNGA Res. 66/99, UN Doc. A/RES/66/99 (2011).

during periods of armed conflict in the context of ITA? For the purposes of this article, we use the two Libyan Civil Wars as a case study for assessing these issues.

We begin, in Section 2, with a brief description of the events arising in Libya over the past seven years, highlighting the ITA claims that have been filed but that remain unresolved. In Section 3, we turn to an assessment of the leading definitions of armed conflict, focusing on an understanding of the temporal aspects of these definitions: when does an armed conflict begin and most importantly for our analysis, when does an armed conflict end? Section 4 focuses on the scenarios under which a State party may be able to suspend or terminate its IIA obligations during periods of armed conflict. Section 5 looks at the distinction between the operability and applicability of IIAs in ITA during and in between periods of armed conflict: i.e., even if an IIA is found to be operable during periods of armed conflict, does the incidence of armed conflict alter the scope of application of a State's IIA obligations in the context of ITA claims? In Section 6, we briefly examine the possible armed conflict-related defences that a respondent State may be able to rely upon in ITA cases arising out of periods of armed conflict. Section 7 summarizes and concludes.

2. The Libyan Civil Wars

2.1 The Political and Military Situation

In late 2010, a Tunisian street vendor self-immolated in protest of unfair treatment and police corruption. Soon thereafter, massive protests started and quickly spread to neighbouring states: the Arab Spring, the “biggest transformation of the Middle East since decolonization,”² had begun. By the end of 2011, rulers had been deposed in Egypt and Tunisia; while Libya, Yemen, and Syria were embroiled in civil wars that continue in some form until today.

In Libya, the uprising began with protests against local municipalities, but soon became a full-scale rebellion aimed at unseating Muammar Qaddafi. The first Libyan Civil War can be said to have begun on 15 February 2011. Anti-Qaddafi forces established an interim governing body, the National Transitional Council (NTC). Already in mid-February 2011, the United Nations (UN) Security Council (UNSC) froze the assets of Qaddafi and his inner circle.³ French, American, and British forces bombed pro-Qaddafi forces after a second UNSC Resolution, and North Atlantic Treaty Organization (NATO) forces took control of the international effort on 31 March 2011.⁴ On 16 September 2011, the NTC was recognized by the UN as the legal representative government of the Libyan State. After Qaddafi was killed in October 2011, the NTC declared Libya liberated on 23 October 2011, marking the end of the first Libyan Civil War. In the following weeks, there were widespread but low-level attacks by some of the remaining pro-Qaddafi forces. However, it should be noted that this initial period of civil strife is not characterized by high level organization: multiple oppositional forces –

² Agdemir (2016).

³ UN Security Council Resolution 1970, adopted by the Security Council at its 6491st meeting, UN Doc S/RES/1970, 26 February 2011. This Resolution also referred the Libyan State response to the protests to the International Criminal Court.

⁴ For an in-depth analysis of NATO's involvement in Libya, see Gaub (2013).

including some Qaddafi loyalists groups – emerged and remain in control of certain areas of Libya to this day.

Nonetheless, the period following the death of Qaddafi was relatively peaceful initially. The interim NTC began the process of governing Libya, with elections being planned and prosecuting former Qaddafi officials. The NTC formed a government on 22 November 2011, including the reconstitution of the Libyan National Army. On 7 July 2012, the NTC organized a parliamentary election that established the General National Congress (GNC), which would ultimately replace the NTC when the new Libyan Prime Minister took power on 8 August 2012.

When the GNC extended its mandate instead of holding elections, the security situation destabilized. In February 2014, General Haftar, an exiled Qaddafi-era general, ordered the GNC to dissolve, then launched Operation Dignity against the GNC on 16 May 2014 after his order was ignored. This was the start of the second Libyan Civil War. After elections in June 2014, a new House of Representative (HoR) was elected and supported by Haftar. Instead of relinquishing power, the GNC formed a government called the New GNC. This forced the HoR to leave Tripoli and to relocate to the eastern Libyan city of Tobruk. In 2015, a UN delegation sought to bring the two oppositional governments together in a Government of National Accord (GNA), which eventually replaced the GNC, while the HoR remain opposed as of June 2018.⁵ Military operations and armed conflict have continued to occur throughout this most recent three-year period, with varying intensity.

Regional powers like Egypt, the United Arab Emirates, Turkey, and Qatar as well as the European Union (EU), France, Russia, the United States (US), and the United Kingdom (UK) and other governments have been involved in a variety of ways, ranging from bombing, delivering weapons, intelligence gathering, political influence, all the way to mediation.⁶ The UN also has a Support Mission in Libya. As of June 2018, the second Libyan Civil War continues to have no clear end (although hostilities have largely ceased); Haftar claims to control most Libyan territory, has emerged as the primary negotiator for his faction, and has strong backing from Russian officials.⁷ For example, in July 2017, Haftar met with the leaders

⁵ In the summer of 2016, the HoR voted against the recognition of the GNA and continued to maintain its government in Tobruk. See *The War Report 2017 – Libya: A Short Guide on the Conflict*, Geneva Academy (2017), p. 3, www.geneva-academy.ch/our-projects/publications/detail/238-the-war-report-2017-libya-a-short-guide-on-the-conflict (last accessed 1 July 2018).

⁶ The UN Panel of Experts on Libya from June 2017 highlights the “foreign support for both factions.” UN, *Final Report of the Panel of Experts in accordance with paragraph 13 of Resolution 2278*, UN Doc S/2017/466, 1 June 2017, www.un.org/ga/search/view_doc.asp?symbol=S/2017/466 (last accessed 1 July 2018). See also the 2017 Human Rights Watch World Report that notes British Special Forces, French intelligence operations, and an American air campaign, among other types of foreign support. *World Report: Libya*, Human Rights Watch (2017), www.hrw.org/world-report/2017/country-chapters/libya (last accessed 1 July 2018).

⁷ See *EU-Libya Relations*, European Union (2017), https://eeas.europa.eu/sites/eeas/files/fact_sheet_eu-libya-relations.pdf (last accessed 1 July 2018); see also Fishman (2017).

of the GNA in Paris at the behest of French President Macron. The two rival factions agreed to – but did not sign a 12-point statement outlining an UN-backed peace process.⁸

2.2 Effects on Foreign Investors

Upheaval and these two Libyan Civil Wars have damaged the Libyan economy. Before these two periods of armed conflict, the economy was poised to grow, bolstered by high oil prices in the mid-2000s and a thawing of relations with many Western states. Then, in 2011, growth dropped to -63 per cent, and has remained negative since.⁹ When the first Libyan Civil War began, there were hundreds of infrastructure projects in Libya.¹⁰ A large portion of the foreign investment was from the Turkish construction industry, but South Korea and China also has a strong presence. In February 2011, there were an estimated 100 construction firms from Turkey operating in Libya, with over 270 unfinished projects worth an estimated 28 billion US dollars (USD).¹¹ Projects in Libya were a large percentage of the Turkish construction industry's revenue and expected returns.¹² Libya was a relatively high-risk destination for investment before 2011, but the profit margins on many projects were large enough that firms accepted the risk.

In early 2011, projects in most areas of Libya were suspended and most of the estimated 20,000 foreign workers left.¹³ Some foreign managers continued to operate on the ground; many firms thought that the unrest would end quickly and that work could then restart. When Qaddafi was killed in October 2011, most construction projects were suspended, and while some had sustained damage, others had not.

Between early 2012 and May 2014, the newly formed Libyan government gave signals of economic and political recovery, in some cases renegotiating its construction contracts for projects that had been suspended. With the start of the second Libyan Civil War on 16 May 2014, many construction companies that had re-mobilized needed to suspended operations again. Since 2014, what has changed is that some firms with unfinished construction projects in Libya have turned to ITA under a variety of IIAs that Libya has ratified.

⁸ Macron brings Libyan Rivals Together, Ruffles Feathers, Arab Weekly, 30 July 2017, <https://thearabweekly.com/macron-brings-libyan-rivals-together-ruffles-feathers> (last accessed 1 July 2018).

⁹ GDP Growth (Annual %), World Bank, <http://data.worldbank.org> (last accessed 1 July 2018).

¹⁰ In addition to the Turkish firms in Libya, there are a number of non-Turkish entities with projects in Libya: including entities from Austria (Strabag), Russia (Russian Railways), Cyprus (Olin Holdings), China (China Railway Construction Company), South Korea (Daewoo), Kuwait (Al-Kharafi), Brazil (Odebrecht), Greece (Consolidated Contractors), Egypt (El-Abd Construction), the United Arab Emirates (UAE) (DS Construction), UK (Magna Holding), the US (Hill International), and Italy (Impregilo).

¹¹ Some of the major Turkish construction firms with large projects in Libya include: Gürış İnşaat, Rönesans İnşaat, Summa İnşaat, Cengiz İnşaat, Enka İnşaat, Tekfen İnşaat, Ustay İnşaat, TAV İnşaat, Ertak İnşaat, and Nurol İnşaat.

¹² Müftüler-Baç (2016), p. 54.

¹³ Libya Evacuations by Country, Reuters, 27 February 2011, www.reuters.com/article/idUSLNE71Q00B20110228 (last accessed 1 July 2018).

Libya has signed bilateral investment treaties (BITs) with 38 states, but only 29 of these agreements are in force.¹⁴ Libya is also a party to the Organization of the Islamic Conference Agreement on Promotion, Protection and Guarantee of Investments (OIC Agreement)¹⁵ and the League of Arab States Unified Agreement for the Investment of Arab Capital in the Arab States (Arab League Agreement).¹⁶ Libya is not a party to the International Centre for Settlement of Investment Disputes (ICSID) Convention¹⁷ or the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).¹⁸

The first entity to initiate an ITA claim against Libya in the period since the beginning of the first Libyan Civil War was a Kuwaiti construction company, Al-Kharafi, under the Arab League Agreement, which ended with an Award of nearly one billion USD in March 2013.¹⁹ While the facts of this case dealt with events pre-dating the first Libyan Civil War and has not yet been successfully enforced by the claimant-investor, the success of the Al-Kharafi case did send signals to other foreign investors that they may have viable IIA claims against Libya. In 2015, the Turkish firm Tekfen İnşaat initiated an ITA claim at the Court of Arbitration for the International Chamber of Commerce (ICC) under both the OIC Agreement and the Turkey-Libya BIT.²⁰ In mid-2015, the Austrian firm Strabag, filed an ICSID Additional Facility (AF) claim under the Austria-Libya BIT.²¹

In addition to these cases, there are now also at least nine additional ITA claims that have been registered. Almost all of these cases arise under the Turkey-Libya BIT (six cases), with one case according to the South Korea-Libya BIT, one case under the Germany-Libya BIT, and one under the OIC Agreement (investor from the UAE).²² All of these cases were filed between

¹⁴ International Investment Agreements Navigator, UNCTAD, <http://investmentpolicyhub.unctad.org/IIA> (last accessed 1 July 2018).

¹⁵ Organization of the Islamic Conference Agreement on Promotion, Protection and Guarantee of Investments (1981).

¹⁶ League of Arab States Unified Agreement for the Investment of Arab Capital in the Arab States (1980).

¹⁷ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 17 UST 1270, TIAS 6090, 575 UNTS 159 (1965).

¹⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968).

¹⁹ Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya, Cairo Regional Centre for International Commercial Arbitration (CRCICA), Final Award (22 March 2013); Technically speaking, Libya's first ITA case is *Intersema v. Libya*, which was brought under the Switzerland-Libya BIT in the mid-2000s, see *Intersema Bau A.G. v. Libya*, UNCITRAL, Award (24 August 2010). But see also two additional ITA cases that relate to disputes that pre-date the first Libyan Civil War, *Olin Holdings v. Libya*, International Chamber of Commerce (ICC), Award (25 May 2018); *Sorelec v. Libya*, UNCITRAL, Consent Award (1 May 2016).

²⁰ The claim was filed in early 2015 and while the exact claims are unknown (case is confidential), it is safe to assume that Tekfen is alleging violations of standard BIT-type standards such as fair and equitable treatment, expropriation, and full protection and security. Tekfen İnşaat also has a related parallel claim arising out of a contract-based ICC arbitration clause. See *Tekfen İnşaat I v. Libya* (BIT and OIC Agreement claim), ICC (2016), pending; *Tekfen İnşaat II v. Libya* (contract claim), ICC (2016), pending.

²¹ *Straberg SE v. Libya*, ICSID Case No. ARB(AF)15/1 (2015), pending.

²² See As Libya begins to see wave of investment treaty arbitrations, at least seven Turkish BIT claims are pursued at ICC, IA Reporter, 31 March 2017, www.iareporter.com (last accessed 1 July 2018); Libya disputes: more details emerge about constitution of arbitral tribunals hearing ad-hoc and ICC investment treaty claims, IA Reporter, 1 May 2017, www.iareporter.com (last accessed 1 July 2018); Libya investment treaty claims: another

late 2016 and the present. They are also all being administered by the ICC. Thus, there are currently at least 11 pending treaty-based arbitrations under four different IIAs that all relate to disputes that arose following the first Libyan Civil War.²³ There are also many other foreign firms watching these arbitrations closely; if these early cases go well for claimant-investors, then many more ITA cases against Libya are likely to appear.²⁴

3. Defining Armed Conflicts

3.1 International Armed Conflicts

From the factual narrative of the situation in Libya, one can delineate a number of dates and periods where some definition of armed conflict is applicable. Generally speaking, the definition of a traditional *international* armed conflict can be derived from common Article 2 to the Geneva Conventions of 1949, which states that:

[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.²⁵

The definition of an international armed conflict clearly requires the involvement of more than one State. Determining whether either of the two Libyan Civil Wars constitute an international armed conflict, one must look specifically at the situation on the ground and whether an armed conflict occurring exclusively within the defined territory of a single State (Libya) may involve intervention of States other than Libya. In regard to the first Libyan Civil War (February to October 2011), the involvement of NATO forces from 31 March 2011 may constitute a conversion of a *non-international* armed conflict (discussed in the next section) to an international armed conflict from the period of March 2011 until the official cessation of the NATO operation in October 2011. As to the second Libyan Civil War, the categorization of the armed conflict as international or non-international is significantly more complicated. In the period starting May 2014, the second Libyan Civil War has been marked by only sporadic and largely uncoordinated international efforts. The US has occasionally led air-strikes against Islamic State (IS) militants and a number of States are said to have been supplying weapons and other forms of support to the different warring factions in Libya since the beginning of the second Libyan Civil War. Whether this involvement by third States constitutes an international armed conflict is unclear.

claim surfaces and another tribunal is finalized, IA Reporter, 29 June 2017, www.iareporter.com (last accessed 1 July 2018).

²³ Nurol İnşaat II v. Libya, ICC (2017), pending; Nurol İnşaat I v. Libya, ICC (2017), discontinued; Ustay İnşaat v. Libya, ICC (2017), pending; Tekfen İnşaat I v. Libya, ICC (2016), pending; Güriş İnşaat v. Libya, ICC (2016), pending; Cengiz İnşaat v. Libya, ICC (2016), pending; Turkish Investor v. Libya, ICC (2016), pending; Etrak v. Libya, ICC (2015), pending; South Korean Investor v. Libya, UNCITRAL (2016), pending; German Investor v. Libya, ICC (2016), pending; DS Construction v. Libya, ICC (2016), pending.

²⁴ Interestingly, in May 2017, the Libyan Privatization and Investment Board organized an Investment Summit in Istanbul for the purposes of demonstrating Libya's interest in attracting foreign investment, despite the fact that foreign investor suits continue to pile up. See www.libyaiinvestsummit.com (last accessed 1 July 2018).

²⁵ International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287 (1949).

3.2 Non-International Armed Conflicts

In regard to defining a *non-international* armed conflict, there are two main legal sources: (1) Common Article 3 to the Geneva Conventions of 1949;²⁶ and (2) Article 1 of Additional Protocol II.²⁷ Common Article 3 applies to “armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties,” which include when one or more non-governmental armed forces are involved in an armed conflict with governmental forces within the territory of a State. These situations frequently include internal armed conflicts that are characterized as civil wars. In order to distinguish a non-international armed conflict from lesser forms of hostilities, Article 1 of Additional Protocol II provides guidance. It applies to armed conflicts:

[W]hich take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations.²⁸

Both definitions of a non-international armed conflict preclude instances of minimal intensity, such as when a government is required to respond to insurrections using police forces as opposed to military forces. Additional Protocol II explicitly excludes situations of internal disturbance, such as riots and sporadic outbursts of violence.²⁹

Under these definitional criteria, it can be argued that both the first and second Libyan Civil Wars rise above the threshold required for a non-international armed conflict. With the exception of the periods where it can be argued that an *international* armed conflict is occurring (i.e., during active NATO operations – April to October 2011), the period of 15 February 2011 through 23 October 2011 (first Libyan Civil War) and the period starting 14 May 2014 (second Libyan Civil War) constitute the existence of *non-international* armed conflicts in Libya.

More difficult to ascertain is whether the period in between the two Libyan Civil Wars (24 October 2011 through 15 May 2014) constitute any type of legally defined armed conflict. The facts on the ground during this intermittent period tend to militate against meeting the minimum threshold for a non-international armed conflict. During this period, there were scattered instances of fighting and insurrection by non- or quasi-governmental forces in various regions within Libya against governmental forces. However, these engagements were unlikely to have the type of organized command structure required to rise to the level of a non-international armed conflict. While the first and second Libyan Civil Wars clearly satisfy the criteria for – at a minimum – a non-international armed conflict, it is unlikely that the period from October 2011 to May 2014 could be considered an armed conflict as understood by international law.

Therefore, for the sake of completeness an additional question begs our attention: does the absence of armed conflict – as defined by the Geneva Conventions and its Additional Protocols allow for the conclusion that in certain periods there was peace in Libya? If so, how should

²⁶ Fourth Geneva Convention, Common Article 3.

²⁷ ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), 8 June 1977, 1125 UNTS 609 (1977).

²⁸ Additional Protocol II.

²⁹ ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 1(2).

these periods of peace be qualified? Certainly, this period cannot be considered one of absolute peace or stability, but from the available information, it does appear that the requirements of intensity, organisation, or protraction cannot be satisfied to render it either an international or a non-international armed conflict.

4. Suspension or Termination of IIAs during Armed Conflicts

Given the definitions of armed conflict provided in the previous section, there is relatively clear guidance on when it can be claimed that armed conflict occurred in Libya for the purposes of assessing a State's treaty obligations during periods of armed conflict. Generally speaking, the assessment of a State's ability to derogate, limit, suspend, withdraw, or terminate its treaty obligations during a period of armed conflict necessitates a determination of whether an armed conflict exists, what type of armed conflict it is, and what are the reasonable dates by which one can assume an armed conflict to have started and ended.

For the purposes of this article – with its explicit focus on the situation in Libya – we take as a starting point that there have been periods of armed conflict in Libya, that these defined armed conflicts are most reasonably characterized as *non-international* armed conflicts, and that it is not reasonable to assume that the armed conflict should be characterized as a continuous period between the beginning of hostilities in February 2011 through to the present. Rather, we propose that the armed conflict in Libya is best categorized as falling within two distinct periods of non-international armed conflict (February 2011 through October 2011 and May 2014 with no clear end) with an *intermittent period of relative peace and stability* (October 2011 through May 2014) that would fail to meet the definition of a non-international armed conflict.

Given these criteria, we now move on to an assessment of the degree to which a State party (in this case, Libya) to an international treaty (in this case, an IIA) can suspend or terminate its treaty obligations *in toto*, or in part, during a period of armed conflict. In regard to the suspension or termination of IIAs, there is significant guidance that can be gleaned from customary international law principles and rules as articulated by the 2011 ILC Draft Articles and the Vienna Convention on the Law of Treaties (VCLT).³⁰ Further guidance in regard to the specific situation in Libya can also be drawn from the UNSC Resolutions passed in reference to the two Libyan Civil Wars.

4.1 2011 ILC Draft Articles

The term 'treaty' is defined within the 2011 ILC Draft Articles by replicating the definition utilised within the VCLT and adding the phrase "and includes treaties between States to which international organizations are also parties."³¹ IIAs clearly and uncontroversial meet these definitions of an international treaty between States.

The phrase 'armed conflict' is defined in the 2011 ILC Draft Articles as follows: armed conflict means a situation in which there is resort to armed force between States or protracted resort to

³⁰ UN, Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, 1115 UNTS 331 (1969).

³¹ 2011 Draft Articles, Article 2(a).

armed force between governmental authorities and organized armed groups.³² Thus, the 2011 ILC Draft Articles collapses the distinction between international and non-international armed conflicts into a single category of ‘armed conflict.’ This definition utilises the definition of ‘armed conflict’ devised by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadic* case but omits the phrase “or between such groups within a State” given that the 2011 ILC Draft Articles only apply to situations involving at least one State party to a treaty.³³

With these definitions in mind, the 2011 ILC Draft Articles takes the general or default position that the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties (in whole or part): (1) as between States parties to the armed conflict; or (2) as between a State party to the armed conflict and a State that is not.³⁴ Therefore, in the case of the two Libyan Civil Wars and the operation of IIAs with States not directly involved with the armed conflicts in Libya, the presumptive starting point is clear: IIAs that Libya has signed and ratified with other States will remain operational during periods of armed conflict.

Given this default position, there remain a number of exceptions that may be possible in certain circumstances. For example, where an IIA itself contains provisions relating to its operation during armed conflicts, these provisions shall determine the matter of their treaty’s continued operation.³⁵ A comprehensive review of all Libyan IIAs currently in force finds that there are no explicit provisions in these treaties that provide clear guidance on their operation during armed conflicts. These type of Non-Precluded Measure clauses do exist in IIAs (most notably in treaties involving the US) and state for example:

[T]his Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.³⁶

Since Libyan IIAs do not include provisions of this kind, an analysis for the purposes of this article is not required; but it is clear that the existence of these types of provisions in an IIA subject to ITA claim would be applicable and would be primary to any application of the customary international law rules as articulated in the 2011 ILC Draft Articles.

However, in the absence of such explicit provisions, the rules of treaty interpretation (as articulated in Articles 31 to 33 of the VCLT) shall apply to establish the ‘susceptibility’ of a treaty to termination, withdrawal, or suspension in the event of armed conflict.³⁷ In essence, what this means is that the rules of treaty interpretation will be used to ascertain the *plain meaning* of the treaty provisions that may be interpreted to allow suspension or termination in the event of armed conflict. There is little further elaboration within the 2011 ILC Draft Articles

³² 2011 Draft Articles, Article 2(b).

³³ 2011 Draft Articles, Articles 2(b), 3; 2011 Draft Articles, Article 2, Commentary, para. 4.

³⁴ 2011 Draft Articles, Article 3.

³⁵ 2011 Draft Articles, Article 4.

³⁶ US-Argentina BIT (1991), Article XI. Another example can be found in the Finland-Tanzania BIT (2001), Article 15(2), which states: “Nothing in this Agreement shall be construed as preventing a Contracting Party from taking any action necessary for the protection of its essential security interests in time of war or armed conflict, or other emergency in international relations.”

³⁷ 2011 Draft Articles, Article 5.

themselves or the commentary upon this process other than to note that both States in general, and members of the International Law Commission (ILC) itself, have been reluctant to characterise this process as one in which the subjective intentions of the Parties are to be ascertained. This was because “the Vienna Conference had clearly opted for an objective test focusing on the meaning of the treaty.”³⁸ Nonetheless, as the 2011 ILC Draft Articles does note, ascertaining the intention of the Parties “is implicit in the process of making the determinations set out in Article 31 of the Vienna Convention.”³⁹

Relevant additional factors for determining the effect of an armed conflict on a particular treaty include, but are not limited to, the nature of a treaty (including its subject matter, object and purpose, context and membership) and the characteristics of the armed conflict.⁴⁰ Some subject matters of treaties will entail a rebuttable presumption that they will continue in operation, either wholly or in part, during an armed conflict.⁴¹ These subject matters are set out in Annex to the 2011 ILC Draft Articles and most importantly include: (1) treaties of friendship, commerce and navigation (FCN) and agreements concerning private rights, and (2) treaties relating to the international settlement of disputes by peaceful means, including resort to conciliation, mediation, arbitration and judicial settlement.

While it has been debated in the scholarly literature as to whether FCN treaties – as precursors to the modern BIT – include IIAs and whether an IIA is an agreement concerning private rights, these arguments appear to be purely academic and unnecessarily pedantic in their assessment.⁴² While it is true that the 2011 ILC Draft Articles do not specifically mention BITs or other IIAs, a facial reading of the Annex points in the direction that IIAs including dispute settlement provisions granting private entities third party beneficiary rights would *clearly* fall into the category of those treaties that the 2011 ILC Draft Articles sought to include as continuing to operate during periods of armed conflict.⁴³

Having determined that the default position for Libya’s IIAs is that they will continue to operate during an armed conflict, we must now look if there are any other exceptions that could overcome the rebuttable presumption against their continual operation. The 2011 ILC Draft Articles discuss three options for States in Libya’s position: termination of the treaty, withdrawal from the treaty, or suspension of the operation of the treaty. Importantly, there is *no* possibility for *automatic* termination, withdrawal or suspension. States *must give notice* when they intend to terminate or withdraw from a treaty or to suspend its operation due to an

³⁸ 2011 Draft Articles, Article 5, Commentary, para. 3.

³⁹ 2011 Draft Articles.

⁴⁰ 2011 Draft Articles, Article 6.

⁴¹ 2011 Draft Articles, Article 7.

⁴² See e.g., Ostřansky (2015); Ackermann T (2016) The ILC Draft Articles on the Effects of Armed Conflicts on Treaties: Room for Termination or Suspension of Bilateral Investment Treaties? Working Paper, http://minervaextremelaw.haifa.ac.il/images/Ackermann_Armed_Conflicts_and_BITs_Minerva_Working_Paper.pdf (last accessed 1 July 2018).

⁴³ In fact, the Commentary to Article 5 of the 2011 ILC Draft Articles states: “treaty mechanisms of peaceful settlement for the disputes arising in the context of private investments abroad [...] may [...] come within group (e) as ‘agreements concerning private rights.’” See 2011 Draft Articles, Article 5, Commentary.

armed conflict.⁴⁴ There is no evidence that Libya or any of its IIA partner States have given notice of an intent to terminate, withdraw, or suspend the operation of any of its IIAs since the beginning of the first Libyan Civil War in February 2011.

However, even if Libya or its IIA State partners had sought to terminate, withdraw, or suspend any of its IIA, the 2011 ILC Draft Articles hold that States would continue to be bound by obligations independent of a particular treaty that replicates that obligation (e.g., obligations under customary international law).⁴⁵ To the extent that many IIAs reflect customary international law rules on expropriation and the international minimum standard of treatment, these obligations would remain in effect regardless of an attempt to terminate, withdraw, or suspend the treaty during periods of armed conflict.

Finally, it is important to note that the 2011 ILC Draft Articles do not affect the application of the VCLT articles regarding the termination, withdrawal, or suspension of treaties as a consequence of material breach, supervening impossibility of performance, or fundamental change of circumstances.⁴⁶ While a detailed assessment of these provisions in the VCLT are beyond the scope of this article, it is reasonable to state that the provisions on the termination, withdrawal, or suspension of treaties under the VCLT would be unlikely to apply to the situation of Libya's IIAs and their continued operation during periods of armed conflict.

4.2 UNSC Resolutions

After finding that it is unlikely that any of Libya's IIAs currently in force could be found to have been terminated, withdrawn from, or suspended during either of the two Libyan Civil Wars, we must turn to the requirements as articulated in the UNSC Resolutions passed in relation to Libya since 2011 and to determine if any of these Resolutions could suspend the operation of any of Libya's IIAs. The 2011 ILC Draft Articles are clear in stating that UNSC Resolutions take precedence over any rules laid down in the 2011 Draft Articles.⁴⁷

Since the start of the first Libyan Civil War, the UNSC has issued over 25 Resolutions relating to the situation in Libya. The UNSC's view of the armed conflicts in Libya is largely consistent with the historical, political, and academic accounts summarized in Section 2 of this article. The UNSC has mostly been silent on defining the two Libyan Civil Wars, with the occasional reference to periods of *non-international* armed conflict. While the UNSC Resolutions to date have not made direct statements on the operability of particular treaties that Libya has obligations under, the Resolutions continually – especially those issued during the first Libyan Civil War – state language that require all Parties to the armed conflict, including Libyan State authorities, to comply with their obligations under international law, including international human rights law (IHRL), international humanitarian law (IHL), and refugee law.⁴⁸

⁴⁴ 2011 Draft Articles, Article 9.

⁴⁵ 2011 Draft Articles, Article 10.

⁴⁶ 2011 Draft Articles, Article 18.

⁴⁷ 2011 Draft Articles, Article 16.

⁴⁸ See e.g., UN Security Council Resolution 1973, adopted by the Security Council at its 6498th meeting, UN Doc S/RES/1973, 17 March 2011, para. 4.

After the end of the first Libyan Civil War in October 2011, the UNSC's makes a rhetoric shift to issues of transitional justice and post-conflict peace building. Of particular note is that the post-first Libyan Civil War Resolutions consistently call for those responsible for IHL and IHRL violations during the armed conflict to be held accountable in accordance with international standards. From mid-2014, the start of the second Libyan Civil War, the UNSC recommenced its reminders that all Parties to the armed conflict must comply with IHL, and also called for the establishment of an immediate ceasefire. The language and timing of the UNSC Resolutions tends to support the view that two separate non-international armed conflicts (the first and second Libyan Civil Wars) have taken place in Libya since 2011.

In summation, the UNSC Resolutions in relation to the situation provide structural evidence supporting the delineation of two distinct periods of armed conflict with an intermittent period of peace in between. Nothing in the UNSC Resolutions would require Libya to terminate, withdraw from, or suspend the operation of its IIA obligations; in fact, the general language of the UNSC Resolutions commanding Libyan authorities and armed groups to uphold and respect their obligations under international law would be a strong indication of support for the proposition that Libya's IIAs not only continue to operate during the periods of armed conflict – but that Libya *must* also make all efforts to comply with those obligations.

5. Operability versus Applicability of IIAs during Armed Conflicts

After finding no factual or legal basis upon which to rest a presumption that Libya's IIAs would somehow not remain operable during periods of armed conflict, we hold that Libya's obligations under its IIAs are equally operable during periods of armed conflict as in periods of peace. That being said, in the next two sections, we look at two other possibilities that may alter the effect of the application of Libya's IIA obligations in the context of ITA: (1) interpretation of the scope of application of specific IIA obligations during periods of armed conflict; and (2) possible customary international law defences that Libya could rely upon under the 2001 ILC Draft Articles of State Responsibility (2001 ILC Draft Articles).

Most of Libya's IIAs include standards of foreign investor protection that are typically found in the universe of IIAs in force around the world. These include, *inter alia*, obligations on State's hosting foreign investments to provide foreign investors with: full protection and security (FPS), fair and equitable treatment (FET), expropriation only following prompt, adequate and effective compensation, non-discrimination (including most-favoured nation treatment (MFN) and national treatment (NT)), non-discriminatory compensation during times of war (War Clauses), and perhaps most importantly, investor-state dispute settlement (ISDS) mechanisms.

The question to ask in regard to the specific obligations in Libyan IIAs is whether or not – in the context of an ITA claim – standards of protection have any degree of variability in their scope of application depending on the factual situation on the ground. In other words, do any of the standards of protection highlighted in the previous paragraph require different thresholds for finding a violation against a respondent State during a period of armed conflict as opposed to a period of peace? The starting point is that all provisions of IIAs will remain operable during periods of armed conflict. This is reflected in an analysis of the 2011 Draft Articles, but also reflects past ITA practice and commentaries by scholars such as Schreuer, who states:

[A]s a rule, treaties dealing with the protection of foreign investments, such as BITs, continue to apply after the outbreak of armed hostilities. This is particularly so where these treaties address the consequences of armed conflicts.⁴⁹

Before addressing the applicability of the IIA provisions, we consider broadly the kind of measures attributed to Libya since the uprising in February 2011. Since the ITA cases against Libya to date have been kept confidential, we consider two possible measures (or omissions) which appear common to most of the cases currently brought against Libya: (1) a failure to fulfil contractual obligations and past due progress payments;⁵⁰ and (2) security breaches.⁵¹ While these measures are generic and likely to fall within the scope of different provisions of the IIAs concluded by Libya, we focus on two standards likely to be invoked in ITA cases against Libya.

5.1 Full Protection and Security

The most compelling argument for a variable standard of protection during periods of armed conflict would relate to the FPS standard. FPS requires that a state employ a due diligence standard to protect a foreign investor's investments from physical damage or confiscation by third parties (local citizens, protestors, and non- or quasi-governmental armed and non-armed groups), as well as the host State itself. It is not an absolute standard of protection, to the extent that it does not impose strict liability on the host State. Rather the FPS requires that a State takes reasonable efforts to protect a foreign investor's property and the assessment of what is reasonable requires a determination of the specific situation on the ground when the alleged violation occurred. It is a relative standard in that, for example, a least-developed State (LDC) with minimal resources to respond to localized violence *would not* be held to the same standard as that of a highly developed State that could easily mobilize police or military forces to protect a foreign investor's property during periods of violence.⁵²

The applicable analogy here is that the FPS standard could conceivably allow Libya a higher threshold for violation in an ITA case relating to periods of armed conflict. This would mean that during the two Libyan Civil Wars, Libya would not be expected to protect a foreign investor's investments with the same degree of diligence as during a period of relative peace. The one caveat to this is that of foreseeability. It might be argued that the duty of Libya to protect according to the FPS standard was lesser during the first Civil War than the second Civil War because the first Civil War was unanticipated. However, for the second Civil War, the FPS standard of due diligence might reasonably be close to the same standard that Libya

⁴⁹ Schreuer (2011).

⁵⁰ Many of the infrastructure and construction projects in Libya that are now subject to ITA claims had already been ongoing at the time of the first Libyan Civil War. Yet, the contracts between Libya (and its entities) and foreign investors were neither suspended nor terminated after the start of either the first or second Libyan Civil Wars. This has produced a backlog of unpaid progress payments for work already completed. Furthermore, with the contracts still operating, bank guarantees still require continued payment and renewal.

⁵¹ As could be expected, the first and second Libyan Civil Wars have resulted in physically damaged and requisitioned property at foreign investor's construction project sites in Libya. In a number of cases, Libya might have failed to provide protection to foreign investors and their investments.

⁵² See e.g., *Pantechniki SA Contractors & Engineers v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009), para. 81.

would be under during a period of peace because any violence in Libya after mid-2014 was clearly foreseeable and anticipatable.

5.2 War Clauses

There is also a less compelling argument that an IIA that includes a version of the so-called War Clause would render other provisions in an IIA inapplicable during a period of armed conflict. The War Clause in the Turkey-Libya BIT requires that:

[I]nvestors of either Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war, insurrection, civil disturbance or other similar events shall be accorded by such other Contracting Party treatment no less favourable than that accorded to its own investors or to investors of any third country, whichever is the most favourable treatment, as regards any measures it adopts in relation to such losses.⁵³

This standard of protection is merely a non-discrimination standard as relating to *losses* that occur during periods of internal violence or armed conflict. In other words, the War Clause – at least in this particular iteration of it – would only require Libya to treat a Turkish investor with the same level of compensation or treatment in regard to losses that it may have occurred during a period of armed conflict that it would provide to its own investors or foreign investors from States other than Turkey.

There are also versions of the War Clause, which is not qualified to discriminatory treatment between foreign investors and nationals, and third-country investors, but provide a form of strict liability for damages arising out of armed conflicts. For example, the 2012 US Model BIT states:

[...] if an investor of a Party, in the situations [of armed conflict, among others], suffers a loss in the territory of the other Party resulting from: (a) requisitioning of its covered investment or part thereof by the latter's forces or authorities; or (b) destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for such loss.⁵⁴

However, this type of War Clause has never been litigated and in regard to the situation in Libya, there are no IIAs applicable to Libya with these types of clauses in any event.

There is an additional argument to consider, however: that in the event that an ITA case is brought against a respondent host State – and the claim relates to a 'war' – then the War Clause renders all other IIA provisions inapplicable during periods of armed conflict because the War Clause is the only provision in the treaty that refers directly to 'war' and that therefore it is reasonable to make a negative inference that only that clause was intended to apply during a period of armed conflict. This argument has a number of serious flaws. First and most importantly, there is no language that states this is the only provision that will be applicable during periods of armed conflict. Second, it is well established that IIAs *do* apply in periods of armed conflict and that, especially the FPS standard – while variable – has been found to apply in ITA cases arising out of armed conflicts. All ITA jurisprudence to date, involving any aspect

⁵³ Turkey-Libya BIT (2011), Article 5 (Compensation for Losses).

⁵⁴ US Model BIT (2012), Article 5(5).

of civil strife, civil war, or armed conflict has explicitly applied the entire IIA subject to the dispute.⁵⁵

While the FPS standard and War Clauses would appear to be the most likely standards to be applied during periods of armed conflict, there is no indication from the text or practice of ITA that other standards of protection would be limited, curtailed or rendered impotent during a period of armed conflict. So long as the IIA is determined to be operable during a period of armed conflict, the provisions of IIAs would also be equally applicable during periods of armed conflicts and periods of peace with similar standards of review.

6. Defences Precluding Wrongfulness during Armed Conflicts

In the context of ITA claims, there is one additional consideration that could permit the derogation of IIA provisions for a respondent host State during periods of armed conflict: the customary international law defences as articulated in the 2001 ILC Draft Articles on State Responsibility pertaining to the preclusion from wrongfulness of state responsibility.⁵⁶ The two most likely sets of provisions in this regard are defences based on necessity and *force majeure*. It is important to state at the outset that these defences are extremely narrow, and while they are applicable in both periods of war and peace, they will require a respondent host State to an ITA claim to surpass a high threshold if they are going to be successful.

6.1 Necessity

Turning first to the doctrine of necessity as rules precluding wrongfulness, the 2001 ILC Draft Articles on State Responsibility provide in Chapter V (Circumstances Precluding Wrongfulness) at Article 25 that:

(1) necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. (2) In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity.⁵⁷

There is considerable jurisprudence on the application of an Article 25 defence in the context of ITA claims; however, this jurisprudence is almost exclusively limited to a particular situation of *economic* necessity in Argentina around 2001. There is no ITA jurisprudence on the use of an Article 25 defence in regard to military necessity. The ITA cases relating to the economic crisis of 2001 found Argentina (in its role as a respondent host State) consistently claiming that it was precluded from wrongfulness due to necessity. However, with the

⁵⁵ Asian Agricultural Products Ltd v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award (27 June 1990); American Manufacturing & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, Award (21 February 1997); Pantechniki SA Contractors & Engineers v. The Republic of Albania, ICSID Case No. ARB/07/21, Award (30 July 2009); Ampal-American Israel Corp. & Others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Jurisdiction and Liability (21 February 2017); Yosef Maiman & Others v. Arab Republic of Egypt, PCA, UNCITRAL, Award (9 February 2017).

⁵⁶ Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001 ILC Draft Articles on State Responsibility), UN GAOR 6th Comm., 56th Sess. (2001), Article 25.

⁵⁷ 2001 ILC Draft Articles on State Responsibility, Article 25.

exception of one case (*LG&E v. Argentina*),⁵⁸ ITA tribunals held that Argentina had failed to satisfy the rigorous requirements of an Article 25 defence.⁵⁹ *Inter alia*, arbitral tribunals held that the measures taken in response to its economic crisis were not the “only way to safeguard an essential interest” and that there were other more reasonable options available to the State.⁶⁰ Furthermore, many of the arbitral tribunals in these ITA cases honed in on the fact that Argentina had “contributed to the situation of necessity” and therefore could not rely on this defence.⁶¹

In regards to the situation in Libya, there are two aspects that were absent in the Argentinian cases: (1) Libya’s situation is related to military necessity not economic necessity; and (2) Libya’s IIAs do not include the same type of exception clauses that were central to many of Argentina’s defences in its ITA cases arising under the US-Argentina BIT.⁶² Nonetheless, some of the same issues will arise if Libya seeks to rely on a necessity defence in its currently pending ITA cases. Similar to the Argentinian cases, it will be difficult for Libya to overcome the ‘only way’ requirement of Article 25(1)(a) and the ‘non-contribution’ requirement of Article 25(2)(b).

On the other hand – at least during the periods of the first and second Libyan Civil Wars – it is likely that arbitral tribunals in the pending Libyan ITA cases would plausibly entertain the idea that measures taken by Libya were taken to protect an ‘essential interest’ of the State, as required under Article 25(1)(a). The argument might go something like this: the Libyan government was seeking to retain control of the State and to ensure peace and security within Libyan society and the continued existence of the government; that seeking peace and security would undoubtedly constitute ‘an essential interest’ of the State; and that this essential interest of the State did face a ‘grave and imminent peril’ as a consequence of the armed conflicts (although whether this peril was actually created by rebel forces or the government’s own forces remains arguable).

It seems less likely, however, that an arbitral tribunal would find Libya’s actions and measures taken to have constituted the ‘only way’ by which it could safeguard peace and security. The Libyan government – in both the first and second Libyan Civil War – resisted any attempts for negotiation with the rebel forces and have frustrated multiple attempts to establish a peace process by the international community as lead by the UN. Likewise, it will be difficult – especially in the context of a non-international armed conflict that constitutes a civil war – for

⁵⁸ *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Argentine Republic*, ICSID Case No. ARB/02/1, Award (25 July 2007).

⁵⁹ Notably the tribunal in *CMS v. Argentina* arrived to such a conclusion. See *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (12 May 2005), paras. 322, 323.

⁶⁰ *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (12 May 2005), paras. 322, 323.

⁶¹ *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (12 May 2005), para. 329. *Enron Corp. and Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No. ARB/01/3, Award (22 May 2007), para. 311.

⁶² Much of the jurisprudence arising out of the Argentinian ITA cases involving the US-Argentina BIT (1991) dealt with the relationship between the Non-Precluded Measures clause (Article XI) in that treaty and the application of the customary international law defence of necessity as articulated in the 2001 ILC Draft Articles on State Responsibility, Article 25. For an overview, see Burke-White and von Staden (2008).

the Libyan State in an ITA case to argue that it did not contribute in any way to the situation of necessity. While a pleading of necessity under Article 25 of the 2001 ILC Draft Articles on State Responsibility has rarely been used to justify military action abroad,⁶³ it is much clearer that such a defence would be possible to cover a situation of necessity relating a non-international armed conflict. However, Libya's extensive violations of human rights and brutal repression of its people, both generally and specifically with regard to the first and second Libyan Civil Wars, would make it difficult, if not impossible to argue that it has not 'contributed to the situation of necessity.'

The final issue regarding the application of Article 25 in the context of the situation in Libya is temporal. It is clear that an Article 25 defence may only be invoked, if at all, to periods of time when the state of necessity is present. In the context of armed conflict, it seems reasonable to assume that a Libya might invoked necessity to preclude wrongfulness for periods covering first and second Libyan Civil Wars, but not to the period of relative peace and security between the two civil wars. Therefore, while the starting assumption will be that an Article 25 defence is unlikely to succeed in even in the context of the first and second Libyan Civil Wars, it is even more unlikely that such a defence could ever be invoked for the period between the two civil wars.

Additionally, Article 27 of the 2001 ILC Draft Articles on State Responsibility, relating to the Consequences of Invoking a Circumstance Precluding Wrongfulness states that:

[T]he invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to: (a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists; (b) the question of compensation for any material loss caused by the act in question.⁶⁴

The implication of Article 27 is that even if a State is precluded from wrongfulness during a period of necessity, the 2001 ILC Draft Articles on State Responsibility make it clear that a successful Article 25 defence does not necessarily prevent that State from having to pay compensation for damage occurred during the period of necessity.

6.2 Force Majeure

In regard to a possible *force majeure* defence, Article 23 of the 2001 ILC Draft Articles on State Responsibility is instructive of the customary international law rule. It states that:

(1) The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation. (2) Paragraph 1 does not apply if: (a) the situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or (b) the State has assumed the risk of that situation occurring. Hence, a *force majeure* defence is one that can be invoked by a State involving a 'situation where the State in question is in effect compelled to act in a manner not in conformity with the requirements of an international obligation incumbent upon it.'⁶⁵

⁶³ 2001 Draft Articles on State Responsibility, Article 25, Commentary, para. 21.

⁶⁴ 2001 Draft Articles on State Responsibility, Article 27.

⁶⁵ 2001 Draft Articles on State Responsibility, Article 23, Commentary, para. 1

In order for Libya to rely on a *force majeure* defence, it must satisfy three elements: the act in question must be brought about by (1) an irresistible force or an unforeseen event; that is (2) beyond the control of the State concerned; and that makes it (3) materially *impossible* (not merely *difficult*) in the circumstances to perform the obligation.⁶⁶ According to the Max Planck entry on *force majeure*, the following three elements are required:

(1) *irresistibility* ('events or situations that are unavoidable or impossible to overcome,' the State must not have been able to act differently),⁶⁷ *unpredictability* (or at least not easily foreseeable, the determining element is whether the occurrence of the event is exceptional or habitual),⁶⁸ and (3) *externality* ('absence of causal link between the situation of *force majeure* being invoked and the acts of the party invoking it').⁶⁹

Applying the requirements of this defence to the situation in Libya, it is critical to state at the outset that while "*force majeure* has substantial currency in the field of international commercial arbitration,"⁷⁰ the invocation of a *force majeure* defence under public international law is distinct from a contractual *force majeure* defence. In the recent *Ampal v. Egypt* case, Egypt sought to rely on a contractual *force majeure* defence in its ITA case. The arbitral tribunal made it clear that it must apply international law standards in its analysis to determine whether there has been a breach of the FPS standard of the treaty, rather than any standard under the contractual regime of the underlying contract such as *force majeure* or the failure to act as a reasonable and prudent pipeline operator.⁷¹

Given the elements needed for an Article 23 *force majeure* defence, the State (in this case, Libya) must have been overcome by an event or series of events that were beyond its control, that it was unable to resist, that were unforeseeable, and that were *not* caused in substantial part by the State invoking the defence. Unlike an Article 25 defence, however, the Commentary to Article 23 makes clear that:

[F]or paragraph 2(a) to apply it is not enough that the State invoking *force majeure* has contributed to the situation of material impossibility; the situation of *force majeure* must be 'due' to the conduct of the State invoking it.⁷²

Therefore, for Libya to invoke a successful Article 23 defence in an ITA case, it becomes a question as to whether either of the two Libyan Civil Wars were 'due' to the State invoking it; and it seems from the facts detailed in Section 2 that it would be difficult for Libya to argue that the *force majeure* situation was *not* caused or due to the actions of the Libyan State. The element of unforeseeability on the other hand may have different thresholds of application in

⁶⁶ 2001 Draft Articles on State Responsibility, Article 23, Commentary, para. 2.

⁶⁷ Simon Hentrei and Ximena Soley, *Force Majeure*, The Max Planck Encyclopedia of Public International Law (2011), para. 12, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1042> (last accessed 1 July 2018).

⁶⁸ Simon Hentrei and Ximena Soley, *Force Majeure*, The Max Planck Encyclopedia of Public International Law (2011), para. 13.

⁶⁹ Simon Hentrei and Ximena Soley, *Force Majeure*, The Max Planck Encyclopedia of Public International Law (2011), paras. 14-15.

⁷⁰ 2001 Draft Articles on State Responsibility, Article 23, Commentary, para. 8.

⁷¹ *Ampal-American Israel Corp. & Others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction and Liability (21 February 2017).

⁷² 2001 Draft Articles on State Responsibility, Article 23, Commentary, para. 8.

relation to the first and second Libyan Civil Wars; and that while the unforeseeability of the first Libyan Civil War might be arguable, it is quite unreasonable to suggest that second Libyan Civil War could ever be categorized as unforeseeable.

In the context of non-international armed conflict that constitutes a civil war, it would appear that an Article 23 *force majeure* defence will be difficult to sustain. Libya must convince an arbitral tribunal in an ITA claim that neither the first or second Libyan Civil Wars were foreseeable and that the actions by non- and quasi-governmental entities in the uprisings were not due to the actions of the Libyan State itself. This will be very difficult to demonstrate.

7. Conclusions

This article has sought to provide a comprehensive overview on the operability and applicability of IIAs in the context the first and second Libyan Civil Wars; and the period of relative peace in between the two wars. We have highlighted that the definition of an armed conflict is only applicable to two distinct periods in Libya: 15 February 2011 through 23 October 2011 (the first Libyan Civil War) and 16 May 2014 with no clear end (the second Libyan Civil War). The period between these two civil wars (24 October 2011 through 15 May 2014), while not completely peaceful, did not rise to the level of a non-international armed conflict.

Given these three distinct periods, we conclude that, according to the customary international law rule replicated in the 2011 ILC Draft Articles, all of Libya's IIAs that are in force remain operable throughout both civil war periods (and during the period of relative peace between the two wars). While pointing out that there are *lex specialis* treaty exceptions relating to states of emergency or war in some IIAs (and may have been applicable in regard to the situation in Libya), we find empirically that there are no such provisions in any of the IIAs to which Libya is a Party.

Considering that the Libyan IIAs remain operational during periods of armed conflict, we did not need to analyse their operability in the period of relative peace between the two civil wars. However, we next looked at whether particular provisions of an IIA that remain operational during an armed conflict may nonetheless be less applicable under certain conditions. We note that the most relevant provision in this regard is the FPS standard, which is a relative standard linked to due diligence, thus must be assessed in context. It is likely, that while applicable, the FPS standard may be more difficult to breach during a period of armed conflict and that the Libyan State's responsibility in providing protection and security to its foreign investors might require a lower degree of vigilance during a period of armed conflict than in a period of peace.

Finally, we considered whether there are any customary international law defences applicable to Libya in its pending ITA cases. We find that the two most relevant defences would be that of necessity and *force majeure* as replicated in the 2001 ILC Draft Articles on State Responsibility, but that both of these defences are very narrow and that the requirements of both defences are unlikely to be met by Libya. Overall, our assessment on the operability and applicability of IIAs in the context of the Libyan Civil Wars is that they remain operational and

that the applicability of certain provisions by an ITA tribunal may require some variation in the standard of review when be assessed in periods of war versus in periods of peace.

REFERENCES

- Agdemir M (2016), The Arab Spring and Israel's Relations with Egypt. *Israel Journal of Foreign Affairs* 10(2):223-235.
- Burke-White WW, von Staden A (2008) Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties, *Virginia Journal of International Law* 48:307-356.
- Fishman B (2017), The Trump Administration and Libya: The Necessity for Engagement, The Washington Institute for Near East Policy Notes, The Washington Institute, Washington DC.
- Gaub F (2013) The North Atlantic Treaty Organization and Libya: Reviewing Operation Unified Protector, US Army War College, Carlisle, US.
- Müftüler-Baç M (2016), *Divergent Pathways: Turkey and the European Union: Re-Thinking the Dynamics of Turkish-European Union Relations*, Barbara Budrich Publishers, New York.
- Ostřanský J (2015) The Termination and Suspension of Bilateral Investment Treaties due to an Armed Conflict. *Journal of International Dispute Settlement* 6:136-162.
- Schreuer C (2011) The protection of investments in armed conflicts. In: Baetens F (ed) *Investment Law within International Law: Integrationist Perspectives*, Cambridge University Press, Cambridge, pp. 3-20.